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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Advanced Television Systems
and Their Impact Upon the
Existing Television Broadcast
Service

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MM Docket No. 87-268

ORIGINAL
FILE

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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The National Cable Television Association, Inc. ("NCTA") hereby submits its reply comments on the Commission's Second Report and Order/Further Notice of Proposed Rulemaking on the implementation of advanced television service ("ATV" or "HDTV") by the terrestrial broadcast industry.

INTRODUCTION

In its initial comments, NCTA expressed concern that the Commission's decision to award valuable ATV spectrum to existing broadcasters without an associated simulcast requirement at the outset undermines the policy and legal bases of the whole ATV process. As NCTA pointed out, the premise for granting incumbent broadcasters a second channel on an interim basis is to enable them to make the transition from a single NTSC channel to a single ATV channel, while continuing to meet their obligation to serve over-the-air viewers. By authorizing two channels, the Commission's goal is, in its own words, "not to launch a new and

separate video service" but "to encourage beneficial technical change in the existing broadcast service by allowing broadcasters to assimilate ATV technology."^{1/}

A simulcasting requirement of essentially the same programming on both channels is inextricably linked to the conditional and transitional grant of the new spectrum. First, a simulcasting requirement protects the consumer investment in existing television equipment by ensuring that consumers are not forced to purchase new receivers in order to receive the same over-the-air programming available to ATV viewers. Second, it protects against the otherwise inevitable diversion of resources from NTSC programming to new and different ATV programming, which would result in lower quality programming for those who rely on NTSC television during the transition.

Third, it facilitates a complete, expeditious conversion from the old standard to the new standard. If, on the other hand, the Commission proceeds with a non-simulcast approach in the early years, it will promote ATV as a separate programming service. This cannot help but impede the transition to the new technology and the reclamation of the conversion spectrum for

1/ Tentative Decision and Further Notice of Inquiry, MM Docket No. 87-268, 3 FCC Rcd 6520, 6537 (1988). See also Second Report and Order/Further Notice of Proposed Rulemaking, MM Docket No. 87-268, paras. 5, 11, 59, 65 (May 8, 1992).

other uses.^{2/}

Beyond these policy concerns, NCTA noted that the failure to require simulcasting when ATV is introduced jeopardizes the legal underpinnings of the ATV process. The Commission has justified its decision to restrict initial eligibility for the ATV spectrum to existing broadcasters on the grounds that this group will foster the most expeditious, non-disruptive transition to the improved technology. Yet, by discarding program simulcasting at the very outset and thereby impeding the transition, the FCC defeats its public interest rationale for the eligibility restrictions. Under Ashbacker and its progeny, any decision to award the new spectrum to existing broadcast licensees without entertaining competing applications is legally vulnerable. Since the threshold eligibility criteria would no longer be linked to the public interest in hastening the conversion to a new standard without disenfranchising NTSC viewers, the Commission's action would be arbitrary and capricious.^{3/}

2/ See Comments of Land Mobile Communications Council (noting that the 15-year time frame for ATV conversion is an inordinate amount of time to tie-up spectrum unless absolutely necessary and urging the Commission to permit timely availability of any unused NTSC spectrum for alternative uses during the transition period.)

3/ In its comments, the National Telecommunications and Information Administration ("NTIA") supported the Commission's decision to limit initial eligibility to existing broadcasters (instead of adopting a competitive bidding procedure) "based on an analysis that characterizes ATV as 'a major advance in television technology, not the start of a new and separate video service.'" Comments of NTIA, pp. 7-8.

Thus, by proposing to delay the full application of its simulcast requirement for the first four years of ATV implementation, the Commission has lost the policy and legal compass of its action. As demonstrated below, the broadcast industry has presented no justification or competing rationale to warrant a change in that view.

DISCUSSION

As expected, the broadcast industry comments confirm NCTA's concern that, without a definitive simulcast requirement up front, ATV will represent the start of a new programming service rather than the implementation of an enhanced technology.^{4/} Indeed, the Joint Broadcasters argue that simulcasting, if required at all, should not even be considered by the Commission until at least its 1998 review of the NTSC-ATV conversion deadline. Instead, they urge the Commission to extend them "maximum flexibility" to program the second channel without regard to the

4/ Comments of Joint Broadcasters (representing 101 broadcast organizations), Fox, Inc., CBS Inc., Capital Cities/ABC, Inc., Golden Orange Broadcasting Co. Whether or not the channels offer differentiated programming, at least one commenter regards the Commission's characterization of ATV service as a new "mode" of television broadcasting, rather than an entirely new service, as "mere labelling". In urging the Commission not to displace existing low power licensees with the introduction of ATV service, Skinner Broadcasting notes that "LPTV service could not have anticipated from the [Commission's LPTV interference] rule or the Low Power Service Order that it would be burdened with holding harmless a mirror image of the existing television service." Comments of Skinner Broadcasting, Inc., p. 6.

impact that differentiated programming will have on NTSC viewers.^{5/}

Fox, Inc., in particular, suggests that different overall program offerings on the ATV channel will be necessary to provide an added incentive for consumers to purchase ATV receivers. Fox not only urges the Commission to afford broadcasters latitude to provide divergent programming on the NTSC and ATV channels, but indicates that it would be appropriate for broadcasters to offer certain ATV productions on a pay-per-view or other subscription basis. Indeed, Fox boldly asserts that anything less than complete and unconditional flexibility with regard to the programming of the second channel amounts to "regulatory overkill".^{6/}

The broadcast industry carefully couches its call for unfettered flexibility in terms of marketplace uncertainties and the need for real world experience with the transition to ATV. But while consumer demand for ATV may be unpredictable, there is simply no policy basis for subsidizing the creation of a new programming service by granting broadcasters a free second channel to utilize at their discretion. Indeed, the broadcasters' persistent view -- despite the Commission's admonition to the contrary -- that simulcasting can be deferred indefinitely flies

5/ Comments of Joint Broadcasters, p. 22; Comments of Golden Orange Broadcasting Co. (seeking authority for UHF stations to provide live local HDTV programming on the ATV channel while separately programming the NTSC channel).

6/ Comments of Fox, Inc., p. 5.

in the face of the Commission's whole ATV regulatory approach from day one.

Moreover, the notion that broadcasters should be allowed to offer their second channel ATV programming on a pay basis is particularly hard to swallow. Under this scenario, there would be no question that over-the-air NTSC viewers would be disenfranchised and that ATV programming would constitute a separate service. And in the absence of a simulcasting requirement, there would certainly be no justification for requiring cable systems, who finance their own expanded capacity, to devote free channel capacity to a new government-subsidized pay service.^{7/}

Furthermore, policy issues aside, there is absolutely no basis for the idea that consumers will be deprived of the immediate enhancements of HDTV unless the programming on the ATV channel is different from the programming on the NTSC channel. The Joint Broadcasters assertion that adopting a simulcast requirement at this time runs the risk of "inhibiting timely and effective development of HDTV programming efforts" is unfounded. As NCTA pointed out in its initial comments, simulcasting will not inhibit a station's ability to experiment with HDTV and to take full advantage of HDTV production values.

7/ In its initial comments, NCTA expressed its concern that ATV implementation may be accompanied by burdensome mandatory carriage requirements for cable systems in light of the cable legislation that has now passed both the House and Senate.

All that it requires is that programming provided on the ATV channel also be made available to NTSC viewers as well. Broadcasters have complete flexibility to develop and test new programming in the wide-screen, high resolution format, provided a lower resolution, 4 x 3 version is offered in NTSC. Indeed, this is routinely done with feature films today, which are readily transcoded and down-converted for NTSC viewers. Other productions that will showcase the unique attributes of high definition television -- e.g., made-for-TV movies, sporting events, concerts, nature shows -- can be readily provided in both formats when ATV is introduced. Once the down-conversion equipment is in place at the station, there will be no additional cost to duplicating the ATV programming for NTSC households (unlike the diversion of station resources that would necessarily accompany the creation of ATV-only programming). Thus, simulcasting will not hinder the ability to develop and exploit the benefits of ATV.

Nevertheless, the broadcasters still seek various other avenues to get around simulcasting. First, in addition to alleging a need for ATV-specific programming, the Joint Broadcasters maintain that strict simulcasting timetables could impinge upon important diversity concerns. As we have seen, however, the Commission's policy basis for the limited grant of additional free spectrum is not to promote diversity, but to effectuate a change in technical standards. If diversity was the issue, the Commission presumably would not limit initial eligibility for the new channels solely to existing broadcasters, but would open up

the application process to other entrants. Moreover, authorizing the use of a second channel on a simulcast basis is entirely consistent with the Commission's intention to treat dual NTSC/ATV transmissions as one service, not two separate programming services.^{8/} If anything invokes diversity concerns, it is the initiation of a new non-simulcast ATV service solely for existing broadcasters: one operator controlling two separate outlets of expression in the same community.

Second, Fox raises the far-fetched argument that the Commission's simulcast requirement implicates "subtle" First Amendment concerns.^{9/} It suggests that under the test enunciated in U.S. v. O'Brien, 391 U.S. 367 (1968), which invalidated the must carry rules, the simulcast rule is vulnerable to First Amendment challenge because it restricts free expression more extensively than necessary to achieve the governmental interest at stake. Fox maintains that less restrictive alternatives, such as down-conversion equipment for NTSC receivers, should be considered before the Commission requires 100 per cent simulcasting.

Here, again, this argument subverts the fundamental reason that the government is giving broadcasters additional free spectrum -- to facilitate a transition to a new standard and to protect the existing NTSC viewing public. The content-neutral

8/ Second Report and Order/Further Notice of Proposed Rulemaking, MM Docket No. 87-268, para. 5 (May 8, 1992).

9/ Comments of Fox, Inc., p. 10.

simulcast regulation is not a restriction on free expression because the availability of the two channels is solely to provide one service to a public with two different technologies during a transition. As such, the simulcast requirement is a reasonable means of accomplishing the Commission's public interest goals and is completely in line with the Commission's authority to restrict the use of scarce spectrum.^{10/} Moreover, in this case, there is a compelling reason to require simulcasting -- to satisfy Ashbacker's demands that eligibility restrictions be tied to a valid public interest rationale.

The Commission has adopted other requirements that affect the content of broadcast spectrum without running afoul of any First Amendment imperative. For example, in FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978), the U.S. Supreme Court upheld the Commission regulations barring common ownership of co-located newspapers and broadcast stations. Broadcasters complained that the rule unconstitutionally conditioned the operation of a broadcast license on giving up the right to speak through a separate and distinct newspaper outlet. But the Court found no First Amendment impediment to such a condition of holding a broadcast license.

In view of the limited broadcast spectrum, the Commission's ownership restriction was a reasonable means for promoting the

10/ National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

public interest in diversified mass communications, even if it meant divesting ownership in a newspaper. Nothing in the First Amendment prevented such allocation and regulation. If the FCC may condition a license based on relinquishing a separate and distinct unregulated outlet of expression, it may surely condition a second license by restricting what may be broadcast on the second outlet, especially where the policy goal of transition licensing is overriding and opportunities to compete for the second license do not exist.

Indeed, the Commission has not hesitated to limit a broadcaster's ability to originate different programming over a broadcast channel where the channel has not been designed to provide a separate program service. In 1990, the FCC declined to grant FM translators program origination authority, even on a limited basis, but restricted their operator to rebroadcast, i.e., simulcast, of primary service stations.^{11/} If a translator wishes to provide full service with nonduplicated programming along with the accompanying public interest responsibilities, then an application for a full service station, with notice and opportunity to compete by others, is the appropriate course, the Commission ruled. Here, too, unless the channels are to be open to others for competing applications, simulcasting must be

11/ Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations, 68 RR 2d 705, 718-20 (1990). It declined to waive this requirement even for communities where there was no possibility of future FM station allotment; id. (declining petition of Gerard A. Turro).

imposed, lest the purpose for which the ATV transition spectrum is made available be thwarted.

The Commission is willing to give broadcasters more free spectrum in order for them to continue to serve all over-the-air viewers in the new ATV environment. If broadcasters do not want to provide ATV programming for NTSC households and would rather trade in their public service obligations for the property rights inherent in the purchase of distribution facilities, then that is different issue. But as long as they are being given the free spectrum for a specific purpose, namely, a transition to a new technology, the condition that they use the spectrum to effectuate that purpose is not unconstitutional.

Furthermore, Fox's reliance on down-converters as a less restrictive alternative to simulcasting is impractical and unworkable. While some manufacturers speculate that affordable down-converters may become available during the transition, the major industry trade group, the Electronic Industries Association, believes that "early down-converters may cost \$500 to \$1500 or more, which will make them of very limited appeal to consumers."^{12/} Moreover, EIA does not expect the price to

12/ Comments of the Electronic Industries Association, p. 9. See also Comments of Sony Corporation, p. 39 (anticipating that downconverters will be considerably more expensive than the average NTSC receiver and videocassette recorder and "non-friendly" to the consumer); Comments of Zenith Electronics Corporation, pp. 4-5 (suggesting that only owners of larger, more expensive NTSC receivers will consider such devices, which are estimated to start at prices of more than \$500.)

decline significantly for 15 years, noting, in any event, that "past experience with consumer behavior suggests that consumers will not be enthusiastic about purchasing, installing, and using downconverters."^{13/} EIA expects similar resistance to ATV-to-NTSC converters. And as NCTA has pointed out, consumers are likely to be particularly reluctant to buy a new piece of equipment that will be rendered obsolete because the technology it supports is mandated for extinction.

But if, as Fox speculates, down-converters provide a simple means to overcome the incompatibility of the two technologies, then once these devices are readily available in the marketplace, there would be no need for broadcasters to transmit programming on two separate channels. The Commission can quickly reclaim the spectrum for other uses.

Lastly, as noted earlier, the Joint Broadcasters are seeking the most open-ended approach to ATV implementation given uncertainties about how rapidly the marketplace will absorb the new technology. The Commission may afford broadcasters increased flexibility by extending the deadlines for application and construction of ATV facilities in light of marketplace factors and adopting a more indefinite transition period. But such issues

13/ Id. Fox blithely compares the A/B switch as a less restrictive alternative to cable must carry rules to down-converters as a less restrictive alternative to simulcasting. A \$500 to \$1500 converter box hardly compares, however, to a "\$7.50 switch" that is "easily install[ed]". Century Communications Corporation v. F.C.C., 835 F.2d 292 (D.C. Cir. 1987).

should not be used as a pretext for eliminating the simulcast requirement at the early stages of ATV implementation. Indeed, the more uncertain the transition process becomes, the more important a simulcast requirement becomes to fulfilling the Commission's goals.

CONCLUSION

As NCTA has previously stated, the cable industry committed to the ATV standards-setting process based on a set of ground rules and policies that are now undergoing substantial change at the behest of the broadcast industry. In reviewing the broadcast industry's requests for maximum latitude and flexibility in implementing ATV, NCTA again urges the Commission not to abandon simulcasting as integral to the advent of advanced television service.

Respectfully submitted,

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